CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

4 November 1975

Mr. A. Searle Field
Staff Director
Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Field:

In response to your request of 26 August 1975 for the opinion of this Agency as to whether Section 6 of the Central Intelligence Agency Act of 1949 provides a statutory basis for denying access to some CIA records and materials to members of Congress or officials of the Government Accounting Office (GAO), I am transmitting herewith the opinion of this Agency. In the study attached hereto entitled Legal Effect of Section 6 of the Central Intelligence Agency Act of 1949, as Amended, we conclude that under certain conditions that section does provide a statutory basis for such denial.

If I can provide further information regarding this subject, please advise.

Sincerely,

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John S. Warner
General Counsel

Enclosure

28 October 1975

MEMORANDUM OF LAW

SUBJECT: Legal Effect of Section 6 of the Central Intelligence Agency Act of 1949, as Amended

1. The question has been asked whether Section 6 of the Central Intelligence Agency Act of 1949, as amended, (50 U.S.C. 403g) "in and of itself and without regard to any other provision of law, provides a statutory basis for denying access to some CIA records and materials to members of Congress or officials of the G.A.O." For the reasons outlined below, it is the opinion of the Central Intelligence Agency that under certain conditions that section does provide a statutory basis for such denial.

2. While it was specifically excluded from this memorandum because of the narrow scope of the question being asked, it should be recognized that other provisions of the National Security Act of 1947, as amended, and the Central Intelligence Agency Act of 1949, as amended, may provide a statutory basis for denying access to certain CIA records. For example, records relating to certain appropriations and expenditures may be denied based on the authorities found in Section 8 of the Central Intelligence Act of 1949.

3. Section 6 states:

> In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of section 654 of Title 5, and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official

titles, salaries, or numbers of personnel employed by the Agency: Provided, That in furtherance of this section, the Director of the Bureau of the Budget shall make no reports to the Congress in connection with the Agency under section 947(b) of Title 5.

4. The section has a significant historical background. As indicated in the section itself, its purpose is two-fold; first, it is "in the interests of the security of the foreign intelligence activities of the United States," and second, it is "in order further to implement the proviso of section 403(d)(3) of this title [Title 50 of the United States Code]." An examination of the background of the third proviso of Section 102(d)(3) of the National Security Act of 1947, as amended, (50 U.S.C. 403(d)(3)) is helpful in a complete analysis of 50 U.S.C. 403g.

5. The third proviso of section 102(d)(3) of the National Security Act of 1947, as amended, provides "That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." This language derived from the Presidential Directive of 22 January 1946 which established the Central Intelligence Group and which provided in section 10 of that Directive, "In the conduct of their activities the National Intelligence Authority and the Director of Central Intelligence shall be responsible for fully protecting intelligence sources and methods."

6. The history of section 10 turns primarily on the opposition of the military intelligence services to central coordination of intelligence activities by a civilian agency and in particular to section 5 of the Presidential Directive, which read, "Such intelligence received by the National Intelligence Authority shall be freely available to the Director of Central Intelligence for correlation, evaluation or dissemination. To the extent approved by the National Intelligence Authority, the operations of said intelligence agencies shall be open to inspection by the Director of Central Intelligence in connection with planning functions." The military intelligence services were much concerned that their clandestine activities and sensitive sources would be compromised if revealed to what they considered an organization not experienced in security matters. They thereupon proposed the wording of section 10 for the purpose of assuring that the Director of Central Intelligence would have a responsibility for protecting their intelligence sources and methods. Initially, therefore, the responsibility was a limited one and would have been properly construed to mean that the Director must institute such security standards and procedures as would adequately protect the information coming from the other agencies. This he would be clearly authorized to do.

7. At the time the National Security Act was being considered, numerous drafts were prepared, all of which contained some language on the responsibility to protect sources and methods. But, the concept was still limited, as for instance in the draft of 9 April 1947 of which section 3(6) read, "be responsible for taking measures to protect sources and methods used in the collection and dissemination of foreign intelligence information received by the Agency." The legal problems involved in any such statement of responsibility were recognized in a memorandum of 10 February 1947 which suggested changing the words to some such phrase as "be responsible for taking measures to protect" sources and methods. Further, in recognition of the legal problems, legislation was proposed designed to give additional protection to classified information, but these proposals were discarded during the consideration of the legislation.

8. During the 79th Congress the House Committee on Military Affairs issued a report which recognized the need for strong national intelligence and made a number of specific recommendations, among which was one that certain of the sections, including section 10, of the Presidential Directive of 22 January 1946 be enacted into law. There is no indication in the report that they knew the background of section 10, and as the legislation progressed it was rephrased until it came out as the third proviso to section 102(d)(3) quoted above. There is little or no legislative history on this proviso except that members of the committees thought that such a responsibility was a good idea and important enough to justify such detail in an otherwise rather general legislative authorization. Historically the Directors of Central Intelligence have considered that the proviso does not prohibit the Agency from taking necessary action in connection with the security of its internal information and its own personnel.

9. As is immediately evident from the historical analysis above, there is an important and key distinction between the statutory responsibility given the Director of Central Intelligence in 50 U.S.C. 403(d)(3) and the means by which he fulfills such responsibility. As indicated in Senate Report No. 106 (10 March 1949), the purpose of the Central Intelligence Agency Act of 1949 was to grant to the Agency the authorities necessary for the proper administration of the Agency which had been previously established in 1947. The Report notes that the Act provides authority for the protection of the confidential nature of the Agency's functions. Thus it seems clear that the Congress intended the Director of Central Intelligence to have certain specific authorities in addition to those of other Executive branch departments and agencies such as the claim through the President of executive privilege.

10. This authority, of course, is not absolute, however. It has been noted by Raoul Berger in his book, Executive Privilege: A Constitutional Myth, that the legislation implementing the Agency "neither requires nor prohibits the supply of intelligence to Congress...." It should be noted here, however, that Congress, in implementing certain agencies, has specifically required the furnishing of certain information to Congress. For example, with respect to certain atomic energy information, 42 U.S.C. 2252 provides:

> The Joint Committee shall make continuing studies of the activities of the Atomic Energy Commission and of problems relating to the development, use, and control of atomic energy. During the first ninety days of each session of the Congress, the Joint Committee may conduct hearings in either open or executive session for the purpose of receiving information concerning the development, growth, and state of the atomic energy industry. The Commission shall keep the Joint Committee fully and currently informed with respect to all of the Commission's activities. The Department of Defense shall keep the Joint Committee fully and currently informed with respect to all matters within the Department of Defense relating to the development, utilization, or application of atomic energy. Any Government agency shall furnish any information requested by the Joint Committee with respect to the activities or responsibilities of that agency in the field of atomic energy. All bills, resolutions, and other matters in the Senate or the House of Representatives relating primarily to the Commission or to the development, use, or control of atomic energy shall be referred to the Joint Committee. The members of the Joint Committee who are Members of the Senate shall from time to time report to the Senate, and the members of the Joint Committee who are Members of the House of Representatives shall from time to time report to the House, by bill or otherwise, their recommendations with respect to matters within the jurisdiction of their respective Houses which are referred to the Joint Committee or otherwise within the jurisdiction of the Joint Committee.

As for the Agency, the Congress took a somewhat different position. In order to provide the Director one means by which he can fulfill his statutory responsibility of 50 U.S.C. 403(d)(3), the Congress chose to exempt the Agency from several provisions of law which otherwise would require the disclosure of sources and methods of the Central Intelligence Agency.

11. Section 6 of the Central Intelligence Agency Act of 1949, as amended, (50 U.S.C. 403g) exempts the Agency from the provisions of 5 U.S.C. 654, which required the Civil Service Commission to publish annually a list of all persons occupying administrative and supervisory positions in the Government, including the official title and compensation of each person listed. 50 U.S.C. 403g exempts the Agency from the "provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." On several occasions the Comptroller General has been called upon to interpret similar provisions of several other statutes. While the Comptroller General has held that the words "notwithstanding the provisions of any other law" do not confer unlimited discretion on those who administer such a statute, he has held that the intent of such wording is to permit the administrator to disregard those laws whose provisions otherwise might prohibit or unduly interfere with the carrying out of the purpose of the statute containing such a phrase. B-5210 (12 August 1939), 22 Comp. Gen. 400 (1941) and B-36980 (23 September 1943). Accordingly, it seems that any law requiring the disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency that might disclose intelligence sources and methods to unauthorized parties can be properly disregarded by the Agency. This assumes, of course, that any such other laws, in particular those passed subsequent to the Central Intelligence Act of 1949, do not contain a "notwithstanding any other law" provision, specifically repeal Section 6, or by specific statutory language overrule it.

12. Section 6 also provides that the Director of what is now the Office of Management and Budget shall make no reports to Congress in connection with the Agency under 5 U.S.C. 947(b), which required a quarterly determination of the number of full-time employees required by each department and agency for the proper and efficient performances of the authorized functions of that department or agency. Excess personnel were to be released. The determinations and the numbers of employees paid in violation of the determinations were to be reported to Congress quarterly.

13. Critical to the understanding of the Director's responsibility to protect intelligence sources and methods is an examination of the qualification of protecting them from unauthorized disclosure. The examination leads to the conclusion that the Director does not have an absolute authority to deny congressional access to CIA records and materials but a qualified or conditional one. 50 U.S.C. 403g and the statutory provision which it implements, 50 U.S.C. 403(d)(3), relate only to the unauthorized disclosure of sources and methods information. It seems evident that, if procedures can be established to the satisfaction of the Director in which he can share information with Congress, yet fulfill his statutory responsibilities and authorities of assuring that such sharing will not lead to the disclosure of that information to unauthorized parties,

then it becomes clear that the Director can share the information yet fulfill the statutory mandate. On the other hand, however, if he is not satified that the procedures will protect the information that is requested by Congress or that is proposed to be given to Congress from unauthorized disclosure, then the statutory mandate requires that he not pass such information. Examples of such procedures are those established between the House Select Committee on Intelligence and the Agency as outlined in the Director's letter of 30 September 1975 to the Chairman of that Committee. Thus, it seems clear that Congress, in passing implementing legislation for the Agency, recognized that the Director of Central Intelligence must have the responsibility and authority to make the final decision in this regard; for if it is otherwise and the judgment is in error the interests of the security of the foreign intelligence activities of this country will clearly suffer.

14. The Comptroller General, in his letter to the Director, Bureau of the Budget (B-74185, 12 March 1948), seems to clearly recognize the importance of Section 6. In that letter the Comptroller stated:

> In an atomic age, where the act of an unfriendly power might, in a few short hours, destroy, or seriously damage the security, if not the existence of the nation itself, it becomes of vital importance to secure, in every practicable way, intelligence affecting its security. The necessity for secrecy in such matters is apparent and the Congress apparently recognized this fully in that it provided in section 102(d) 3 of Public Law 253, that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthcrized disclosure.

STAT [redacted]

JOHN S. WARNER
General Counsel

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Assistant General Counsel

Washington, D.C. 20505

16 December 1977

The Honorable Wyche Fowler, Jr.
Permanent Select Committee on Intelligence
U. S. House of Representatives
Washington, D. C. 20515

Dear Congressman Fowler:

Your letter of December 1 asked that I identify "the legislation which authorizes the DCI to withhold intelligence information from the House Permanent Select Committee on Intelligence." The short answer is that in my opinion there is no such legislation.

While I have not yet seen a transcript of the November 30 proceedings to which you referred in your letter, and while therefore I do not have the benefit of the exact context of your exchange with the Director, it seems certain that the exchange centered on Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. §403(d)(3). A proviso in that section makes the Director of Central Intelligence "responsible for protecting intelligence sources and methods from unauthorized disclosure." An implementing provision in Section 6 of the CIA Act of 1949, 50 U.S.C. §403g, exempts the CIA from "the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency."

I take as a starting point the proposition that as a practical matter intelligence activities could not be successfully conducted, at least not for very long, unless intelligence agencies were reasonably secure against the compelled disclosure of information. I believe the Congress accepted that proposition when it enacted the sources and methods proviso in the National Security Act of 1947 and the implementing provision in the CIA Act of 1949. Both statutes in my view evidence a recognition that there are circumstances under which the withholding of certain information relating to intelligence activities is justified, if indeed it is not affirmatively required. That is not to say, however, that the rights and responsibilities created by these statutes are absolute, and certainly it is not to say that Congress acted in such a manner as to deliberately and effectively deny itself information that might be needed in the performance of its own legislative functions. On the contrary, I think it must be assumed that in enacting these statutes, whatever powers to withhold information it may have intended to confer or whatever duty to withhold information it may have intended to establish, the Congress did not intend to surrender or forfeit any of its own constitutional prerogatives, and I know of nothing in the legislative history of either statute that undercuts that assumption.

Both the sources and methods proviso in the National Security Act of 1947 and the implementing provision in the CIA Act of 1949 have been judicially construed. For example, the proviso has been seen as a proper foundation for the secrecy agreements that CIA employees must sign as a condition of their employment. U. S. v. Marchetti, 466 F.2d. 1309 (4th Cir. 1972). In addition, the proviso and the implementing provision have been given effect repeatedly as non-disclosure statutes for purposes of the Freedom of Information Act. See, e.g., Weissman v. CIA, (D.C. Cir. No. 76-1566, decided January 6, 1977); Phillippi v. CIA, (D.C. Cir. No. 76-1004, decided November 16, 1976). Whether these statutes created an independent evidentiary privilege, as against the disclosure demands of private plaintiffs in civil proceedings other than FOIA actions, is also a question that has been litigated, and I regard that question as still unsettled notwithstanding the negative conclusion reached in one recent case. See the attached opinion of Judge Griesa, dated June 10, 1977, in Socialist Workers Party v. Attorney General, (Civil No. 73-3160, S.D.N.Y.); see also Heine v. Raus, 399 F.2d. 785 (4th Cir. 1968). None of these precedents offers much in the way of immediate guidance, however, since none involved a dispute between the executive and the legislative branches and none presented an occasion to consider whether the statutes created some sort of a privilege as against the Congress. That question has never been litigated. Nor am I aware of any prior opinions prepared by the Department of Justice, or by this Office, dealing with that specific question.

It is my view that nothing in the 1947 or 1949 legislation, or in any other legislation for that matter, gives the CIA or the DCI an ultimate legal right to withhold information from any committee of the Congress, let alone from the committees that authorize CIA appropriations and are charged with the oversight of CIA activities. In saying that, though, I do not mean to imply that in all circumstances we would concede the right of any committee to obtain any information that it might request. The congressional power of inquiry, while broad, is not unlimited, see, e.g., Wilkinson v. U. S., 365 U. S. 399 (1961) and Watkins v. U. S., 354 U. S. 178 (1957), and situations could well arise in which we would resist disclosure of information requested by committees not exercising oversight with respect to CIA, on grounds that the particular requests seemed unrelated to any valid and authorized legislative purpose or that at least our concerns about the compromise of intelligence sources and methods should first be weighed by our oversight committees and balanced against the asserted legislative need. Nor do I mean to imply that there are no circumstances in which requested information might be withheld, even from the House Permanent Select Committee on Intelligence. So, for instance, if the DCI were asked in open session, or even in executive session, to identify CIA agents by name, I think it is safe to predict that the Director would decline. In all probability he would cite his statutory responsibility to protect intelligence sources against unauthorized disclosure, stress the extreme sensitivity of the requested information, and seek an accommodation that would allow the legislative interest to be served without

sacrificing the intelligence interest. If the demand were pressed, however, say by the issuance of a subpoena calling for the production of a list of names, any refusal to comply would be based not on the statutory powers of the CIA or the DCI but rather on the constitutional powers of the President, whose personal decision in the matter would be required.

As you know, the history of disputes between the executive and the legislative branches, with regard to demands of the latter for information in the control of the former, has been a history of compromise. Only once to the best of my knowledge, in the still active case of U. S. v. American Telephone and Telegraph Co., have the respective constitutional powers of the President and the Congress, to withhold or obtain information relating to the national security, become the subject of judicial consideration. The AT&T case has twice reached the Court of Appeals for the District of Columbia Circuit, but in neither of the two resulting opinions (one dated December 30, 1976 and one dated October 20, 1977, copies attached) have the merits of the controversy been resolved. Rather on both occasions the Court of Appeals has remanded the case with directions to the parties to undertake further negotiations looking towards possible settlement. See also Comment, United States v. AT&T: Judicially Supervised Negotiation and Political Questions, 77 Col. L. Rev. 466 (1977), copy attached. Judicial reluctance to side either with the President or the Congress in a dispute of this sort is clearly apparent in both the AT&T opinions, and the reasons for that understandable reluctance are elaborated in the attached law review article.

In the end, I believe, and I am sure you will agree, that confrontation and litigation are poor alternatives when it comes to issues concerning the distribution of powers between the executive and legislative branches. Far better outcomes will be found, and bruising head-on collisions avoided in the process, if there is a spirit of cooperativeness on the part of the executive matched by reasonable self-restraint on the part of the Congress. I am confident that these conditions exist as between the Agency and the HPSCI. I also want to assure you, as I understand you were assured by the Director, that under no circumstances would false or misleading statements be regarded by the Agency as permissible responses to congressional requests for information. Should we receive a request to which we were not prepared or willing to respond, we would make our position and our reasons known so that matters could then proceed from that footing.

Sincerely,

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Anthony A. Lapham
General Counsel

CENTRAL INTELLIGENCE AGENCY
Office of Legislative Counsel
Washington, D. C. 20505
Telephone:

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Entire package filed in 3 HO

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TO: Tom 25 Ja

Per your request —
I am also volunteering
Tony's later opinion of
16 Dec which you already
have —

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sent to Tom Latimer, HPSCI, via courier 26 Jan 78